(2)

No. 99-849

In The

Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner,

vs.

THE SUPREME COURT OF GUAM, Territory of Guam,

Respondent,

THE LONG-TERM CREDIT BANK OF JAPAN, LTD.,

Real Party In Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE GOVERNMENT OF GUAM, DEPARTMENT OF REVENUE AND TAXATION, IN SUPPORT OF THE POSITION OF PETITIONER EIE GUAM CORPORATION

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INTEREST OF THE AMICUS CURIAE

The Department of Revenue and Taxation of the Government of Guam (hereinafter referred to as "DRT") is part of the Executive Branch of the Government of Guam. 5 Guam Code Ann. § 3114. DRT acts as the local taxation authority for income taxes, both corporate and personal, in place and instead of the U.S. Internal Revenue Service. 48 U.S.C. § 1421i(c); 11 Guam Code Ann. § 1104. DRT is also responsible for collecting a variety of other taxes as provided for by law, including the Guam gross receipts tax. *Id.*

In addition to its taxation function, DRT is also responsible for administering and enforcing compliance with Guam's business licensing, banking, and corporation laws. 11 Guam Code Ann. § 1104(c) and (j). Because DRT is responsible for these two essential functions, taxation and business regulation, DRT has a keen interest in the outcome of petitioner's writ of certiorari.

INTRODUCTION

DRT files the instant Brief of Amicus Curiae, pursuant to Rule 37 of the Supreme Court Rules of Appellate Procedure, as a branch of the Government of Guam. DRT has elected to file this brief because it is concerned about the potential ramifications in the event that this Court should decide not to grant petitioners writ of certiorari.

DRT contends that the trial court in this case reached a legally sound decision based upon certain undisputed facts, that the Guam Supreme Court erred in reversing

that decision, and that the Ninth Circuit Court of Appeals has an obligation to correct that error. If the opinion of the Guam Supreme Court that the Long-Term Credit Bank of Japan ("LTCB") is entitled to an implied exemption from Guam's business and foreign corporation licensing laws is allowed to stand, DRT fears that foreign corporations will be encouraged to take calculated steps to minimize or even deny their corporate and business presence and activities on Guam for the purpose of evading Guam's licensing and registration statutes, as well as its tax laws.

SUMMARY OF THE ARGUMENT

The Ninth Circuit has an obligation under 48 U.S.C. § 1424-2 to monitor the recently created Guam Supreme Court and to prevent that court from issuing erroneous opinions that have a substantially adverse effect on the territory. The Guam Supreme Court opinion at issue in this case is in contradiction to the explicit provisions of Guam's statutes and directly undermines DRT's ability to perform its function as the agency responsible for regulating commerce within Guam's borders. This erroneous opinion will enable countless foreign businesses to completely avoid regulation by DRT, and even more importantly, to completely avoid paying the appropriate taxes to the Government of Guam.

Under Guam law, DRT is the agency tasked with determining (in the first instance) whether any particular

business entity, foreign or domestic, is entitled to exemption from Guam's business license laws. DRT has carefully reviewed the facts of this case as presented to the courts of Guam, and, if given the opportunity, DRT would have determined that LTCB is not entitled to an exemption from Guam's business license laws.

The Guam Supreme Court's opinion, however, eliminates DRT's discretion to make that determination by creating a blanket exemption for a huge category of foreign businesses. Given Guam's small size and its close proximity to foreign investors, the erroneous opinion will have a devastating effect on the financial condition of Guam's government. The opinion falls squarely within the class of harm that 48 U.S.C. § 1424-2 was enacted to prevent, and the Ninth Circuit has an obligation to review it.

ARGUMENT

I

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO 48 U.S.C. § 1424-2 BECAUSE IT WILL SUBSTANTIALLY IMPACT THE GOVERNMENT OF GUAM AND ITS CITIZENS

In an island economy such as Guam, many different types of foreign businesses engage in economic and commercial activities. These foreign businesses are engaged in these activities for the purpose of making money. In the course of their activities, they utilize government

facilities, contract with Guam companies, and affect Guam property and the interests of Guam's citizens.

The Government of Guam has a strong public interest in assuring that these foreign companies conduct themselves lawfully and ethically, that they comply with applicable Guam law, and that they pay their taxes when appropriate. The mechanisms enacted by the Guam Legislature to enable DRT to monitor the activities of such foreign companies are the Foreign Corporation Law and, most specially, the business license requirements set forth in 11 Guam Code Ann. Chapter 70.

Without either a business license or a statement of exemption on record, unlicensed foreign businesses do not even show up on the "radar screen" of this department. Such foreign businesses can come to Guam, engage in commercial activities, utilize Guam facilities, contract with Guam companies, affect Guam properties, implicate the rights of Guam citizens, and then sneak out of Guam with their profits and without paying taxes, placing themselves beyond the reach of Guam law. In addition, our citizens' ability to pursue their legal remedies against such foreign corporations will be severely limited by not having a party to serve. The registration of the foreign corporation provides this mechanism for our citizens.

Guam is a small jurisdiction relative to the size of any of our States. With an area of just over 200 square miles, Guam is less than one-sixth the size of the smallest State, Rhode Island, which has an area of 1,250 square miles. Guam has a population of approximately 150,000, less than half that of the least populous State, Wyoming. Guam also lacks ready access to resources available in

large cities of the United States, partly because of distance and partly because telephone communications are limited by the extreme time zone differences.

Moreover, Guam's DRT must function substantially on its own. It cannot as readily call upon the tax expertise of locally-posted IRS personnel as can the tax departments of the States. Furthermore, Guam has the burden of collecting the mirror income tax as well as the Guam Gross Receipts Tax, since the U.S. income tax is not applicable in Guam.

Guam, as the only U.S. territory in the Western Pacific, has experienced a deluge of new local and international commerce, with the concomitant demand for more and better government services to meet the expanding needs of the businesses involved. Especially for the visitor industry, more reliable electric power and other utility services, better roads, an upgraded airport, and better police and fire protection are a growing necessity; and the costs of these improvements must be shared by businesses – foreign and domestic alike – that have necessitated them. This means that foreign companies engaged in commercial activities on Guam must pay their fair share of the tax burden.

The Government of Guam, with fewer resources because of its small size and relative isolation, and with greater responsibilities, finds itself with the difficult task of administering complex tax laws in an increasingly complex and cosmopolitan world. Just identifying all of those who should be taxpayers and should be regulated is an overwhelming and near impossible task. Thus, even

more than on the U.S. mainland, tax and regulatory compliance is voluntary.

Guam's business license laws play an essential role by requiring that businesses subject to regulation and tax liability affirmatively comply with all licensing regulations. Compliance with Guam law by obtaining the required license or exemption before business is done is simple, routine and in no way burdensome. Some investors have chosen, however, to ignore these simple requirements. Thus, the penalty imposed by 11 Guam Code Ann. § 70130, namely, the threat of not being able to enforce contractual rights, provides powerful motivation for businesses to voluntarily comply.

II

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO U.S.C. § 1424-2 BECAUSE IT FAILS TO PROPERLY APPLY THE APPLICABLE PROVISIONS OF GUAM LAW

The most recent legislation in Guam pertaining to business licenses is 11 Guam Code Ann. § 70130. Section 70130 plainly requires that "all businesses" obtain either a business license or a statement of exemption. Notwithstanding the explicit language and the clear intent of § 70130, the Guam Supreme Court held that LTCB is not required to obtain either a business license or statement of exemption.

Under the clear language of Guam's statutory scheme, a DRT application under the Business License Law provides the mechanism by which the department

can assess the need for further regulatory licenses, and determine whether tax returns should be filed and whether tax revenues may be due. The licensing process, furthermore, offers the Government the opportunity to obtain any further information that it considers necessary to assess whether the Government of Guam has a substantial public interest in regulating, or even prohibiting, the particular business involved.

As just one example, a foreign corporation engaged in business in Guam was detected, a few years ago, in the act of importing slot machines, roulette wheels, and other gambling equipment that it intended to utilize in its business. It would be difficult to argue that the Government of Guam had no interest in, or right to control, such blatantly illegal activities.

11 Guam Code Ann. § 72102, like § 70130, is unambiguous. It states: "Every person engaged in or carrying on business in Guam of banking . . . shall be required annually to obtain a commercial license." It is undisputed that LTCB has not complied with the licensing requirements of 18 Guam Code Ann. § 7104 or 11 Guam Code Ann. § 72102, nor has it obtained a statement of exemption pursuant to § 70130.

Contrary to the opinion of the Guam Supreme Court, 11 Guam Code Ann. § 106730 does not exempt LTCB from the business license requirement of 11 Guam Code Ann. § 106721. Section 106730 merely states that "[n]othing in [the] Chapter" pertaining to foreign banking corporations shall be deemed to prohibit a foreign bank which does not maintain an office in this Territory from making loans in Guam. Section 106730 *does not exempt* foreign banking

corporations from complying with the other licensing laws of Guam (such as §§ 7104, 70130, and 72102) which are not contained in the "Chapter" pertaining to foreign banking corporations. Foreign banking corporations without offices on Guam can make loans and engage in business on Guam provided they comply with Guam laws.

Even if it were to be assumed, *arguendo*, that § 106730 does exempt LTCB from obtaining a business license, LTCB nevertheless is still required to obtain a statement of exemption pursuant to § 70130. The language of § 70130 makes clear that even entities explicitly exempted by statute from obtaining business licenses, such as, for example, religious organizations, are nonetheless required to obtain a statement of exemption.

Furthermore, 18 Guam Code Ann. § 7106, clearly provides that foreign corporations are bound by *all* laws, rules and regulations applicable to domestic corporations, and in particular the Business License Law. This statute could hardly be clearer. Foreign corporations are to be treated in the same manner as domestic corporations, except as provided for by the statute. The Business License Law's requirements are expressly stated to be binding upon foreign corporations, as they are upon domestic corporations.

Again, assuming, *arguendo*, that LTCB were correct in its interpretation of § 106730, LTCB has exceeded the scope of any exemption granted to it under that section. Section 106730 *at most* merely authorizes foreign banking corporations to make loans "in this territory secured by mortgages on *real property* or [to accept] assignments of

mortgages covering *real property*." 11 Guam Code Ann. § 106730 (emphasis added).

LTCB did not merely make loans "secured by mortgages on real property." LTCB also obtained security interests in the personal property and intangibles of a Guam corporation through stock pledges, assignments on Guam bank accounts, and UCC security agreements. Section 106730 does not in any manner even arguably authorize loans secured by stock pledges, Guam bank accounts, or personal property without a license. LTCB has greatly exceeded any authority granted to it under § 106730, and has committed a crime by failing to comply with this statute.[1]

III

THE GUAM SUPREME COURT'S OPINION SHOULD BE REVIEWED BY THE NINTH CIRCUIT PURSUANT TO 48 U.S.C. § 1424-2 BECAUSE IT UNDERMINES THE FUNCTION OF THE DRT

The administration of Guam's business licensing laws is vested in DRT. 11 Guam Code Ann. § 70104. Likewise, the administration of Guam's banking laws is vested in DRT. 11 Guam Code Ann. § 103101. Furthermore, 11 Guam Code Ann. § 70130 states that anyone entitled to an exemption "*shall* obtain a statement from the Department of Revenue and Taxation."

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[1] 11 Guam Code Ann. § 106734 makes it a misdemeanor for a foreign banking corporation to fail to comply with the provisions of Guam's licensing laws.

It is undisputed that LTCB has never even sought an exemption from DRT. It is also undisputed that DRT *will not* grant an exemption to a foreign bank doing business in Guam.

Under well settled principles of administrative law, the procedure that LTCB *should* have followed in this case was to make an application to DRT for a certificate of exemption, pursuant to § 70130. When this application was denied, as it would have been under all of the facts of this case, LTCB – if it felt aggrieved by this administrative decision, and if it concluded that it was entitled to a certificate of exemption as a matter of law – could then have brought an administrative mandamus proceeding in the Superior Court of Guam, seeking judicial review of DRT's administrative determination. In the event that it remained unsatisfied with the Superior Court's determination in such an administrative mandamus proceeding, it could *then*, and *only* then, have appealed that determination to the Guam Supreme Court.

The general and well settled rule is that the determination of an administrative agency on the law under which it acts is entitled to substantial deference, *Chevron, USA, Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 684 (1984), and that such an administrative decision will not be disturbed unless it appears clear that such administrative interpretation is completely inconsistent with the legislative intent. *United States v. Shimer*, 367 U.S. 374, 81 S.Ct. 1554, 1560-61 (1961). In this case, however, even that liberal standard does not apply, in view of the fact that LTCB chose to ignore the administrative process entirely.

DRT is responsible for administering Guam's business licensing, banking, and tax laws. This Court *in Chevron v. Natural Resources, supra,* 104 S.Ct. at 2782, held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Although LTCB evaded any formal administrative ruling on the issue, the Director of DRT has expressly stated that a foreign banking corporation engaged in banking or other business on Guam *must* obtain the prescribed Guam licenses even if it does not maintain an office on Guam. Therefore, if LTCB has been engaged in banking or other business on Guam, it is not entitled to any exemption under § 106730.

The trial court below was not asked to rule that *all* foreign banks are ineligible for an exemption under § 106730 under any and all circumstances. All that the trial court determined was that LTCB, in this particular case, at the very least, had "engaged in commercial or other money-making activity in Guam." The Guam Supreme Court's opinion reversing the trial court's decision, however, categorically establishes that § 106730 creates a special exemption for *all* foreign banks. DRT submits that this will provide foreign banks with the means and the incentive to ignore Guam law regarding taxation and licensing.

Moreover, the Guam Supreme Court's opinion completely ignores the impact it will have on Guam's American Investors Act ("AIA"), 11 Guam Code Ann. § 35105. Pursuant the AIA, American lending institutions may make loans and receive security for loans on Guam only

after they have registered with the DRT. The Guam Supreme Court's opinion would make foreign lenders exempt from even this type of registration requirement. Thus, under the opinion, foreign lenders receive a blanket exemption from Guam's business license laws, while non-licensed U.S. banks must still comply with the AIA. In light of the AIA, the Guam Supreme Court's opinion simply makes no sense.

Under the specific facts of this case, affirming the trial court's decision would affect only LTCB and would not have any significant impact upon legitimate foreign banks that have merely obtained mortgages on real property in this jurisdiction, but have not engaged in such extensive activities in Guam as has LTCB. Each situation should be evaluated by DRT (in the first instance) based on the facts at hand. If a particular foreign bank is entitled to an exemption, DRT, upon application by that bank, will issue the appropriate certificate.

Because of the important tax basis for Guam's Business License Law, DRT is greatly concerned that if this Court does not grant certiorari, LTCB and others similarly situated will, in effect, be encouraged to evade lawful taxation. The Business License Law affords DRT an efficient mechanism for enforcing the tax laws of the territory. This mechanism is highly desirable, particularly for a small jurisdiction and island economy such as Guam, which has limited manpower to devote to investigation of tax evasion and enforcement of tax laws. It is respectfully submitted that if this Court denies certiorari, thereby granting the wholesale exemption LTCB seeks,

DRT will effectively lose one of its most important tools for collecting tax revenues and enforcing tax laws.

CONCLUSION

DRT is the government agency on Guam responsible for the administration of Guam's business licensing and taxation laws. DRT is concerned that the Guam Supreme Court has created wholesale exemptions to Guam's business license and foreign corporation statutes. In essence, the Guam Supreme Court opinion grants certain foreign corporations, and certain foreign banking corporations in particular, a privileged position that properly-licensed local and foreign companies which follow the law and pay their fair share of taxes do not enjoy.

If LTCB, or any other business, should feel that it is entitled to an exemption from the requirements of Guam law, it should apply for such exemption from DRT. It is plain, in the instant case, that LTCB has not applied for either a business license or statement of exemption because of its substantial tax liability to the Government of Guam. The Guam Supreme Court's opinion, in DRT's view, frustrates the purpose of Guam's business and foreign corporation licensing statutes and encourages foreign corporations to maintain phantom or stealth existences on Guam and to evade their fair share of taxes.

The Ninth Circuit should reverse the Guam Supreme Court's opinion and thereby affirm the decision of the trial court. This will send a clear message that if foreign corporations follow the explicit provisions of the law and play by the rules, their investments are safe on Guam; but

those who attempt to sidestep or evade the law had best be prepared to face the consequences expressly and clearly provided by Guam's statutes.

The Government of Guam, Department of Revenue and Taxation accordingly requests that Petitioner's writ of certiorari be granted.

Dated: December 16, 1999.

Respectfully submitted,

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